79-1192

Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979
No. 79-1192

FOREST E. OLSON, INC., and
COLDWELL BANKER AND CO.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
4th APPELLATE DISTRICT, DIVISION 2

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the California Fourth District Court of Appeals herein is reported in the California Official Reports at 96 Cal. App.3d 181 and appears in the appendix to the Petition for Writ of Certiorari filed herein. No opinion was rendered by the Supreme Court of the State of California in denying tne petition for hearing filed by petitioners.

JURISDICTION

On March 8, 1979 the trial court in the case at bar declared the California false advertising law (California Business and Professions Code Section 17500 *et seq.*) unconstitutional on its face because the statutes involved

permitted recovery by the District Attorney in a civil action of civil penalties, upon a showing that the advertisement was false and/or misleading and was published as a result of the advertiser's negligence. The trial court thereupon dismissed the civil complaint and granted a motion for summary judgment against plaintiff, the People of the State of California.

On August 21, 1979 the California Fourth District Court of Appeals Issued a peremptory writ of mandate and/or prohibition to the respondent trial court directing the trial court to vacate its order declaring Business and Professions Code Section 17500 *et seq.* unconstitutional. On November 15, 1979 the California Supreme Court denied a petition for hearing.

Respondent concedes that this Court has jurisdiction to decide the questions presented pursuant to 28 U.S.C. Section 1257 (2) and (3) in light of *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975).

QUESTION PRESENTED

Can the State of California properly enact a statutory scheme prohibiting false and misleading advertising, enforced by civil monetary penalties, if there is a showing that the information placed in the advertisement was negligently acquired and disseminated to the members of the public?

STATUTES INVOLVED

The following statutes, codified in the California Business and Professions Code, are collectively referred to as the "Statutes":

Business and Professions Code Section 17200 (formerly at *Civ. Code Section* 3309 *et seq.*):

"As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Business and Professions Code Section 17206:

"Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed Two Thousand Five Hundred Dollars ($2,500) for each violation . . . "

Business and Professions Code Section 17500:

"It is unlawful for any person, firm, corporation or association, of any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation or in any other manner or means whatever, any statement, professional or otherwise, concerning such real property or services or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, or for any such person, firm or corporation to so make or disseminate or cause to be made or disseminate any such statement as part of a plan or scheme with the intent not to sell such personal property

or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding Two Thousand Five Hundred Dollars ($2,500), or by both."

Business and Professions Code Section 17502:

"This article does not apply to any visual or sound radio broadcasting station or to any publisher of a newspaper, magazine, or other publication, who broadcasts or publishes an advertisement in good faith, without knowledge of its false, deceptive, or misleading character."

Additionally, Section 17536 of the California Business and Professions Code provides for a maximum civil penalty of $2,500 for each violation. Suit may be brought by the California Attorney General, or any district attorney, county counsel or city attorney.

STATEMENT OF THE CASE

In July, 1974, defendant Forest E. Olson, Inc. began running a full page advertisement in several Southern California newspapers. The advertisement consisted of a list of 406 street addresses surrounding a box containing the following message:

> "SOLD IN 8 DAYS OR LESS in Orange and Riverside Counties! When you list your home with FOREST E. OLSON BE PREPARED TO MOVE FAST! Information from Forest E. Olson's Computer Center 1/1/74-3/31/75"

The same advertisement, with the same message modified to say "IN 4 DAYS OR LESS", was run on at least four occasions during 1975.

Also during 1975, Forest E. Olson aired a radio advertisement over 11 stations consisting of the following message played against a background of a male monotone voice reading a list of addresses from a computer readout so rapidly that the addresses could only be identified as property locations:

> You are listening to the computer readout of homes sold by Forest E. Olson Realtors in no more than eight days . . . . However, some people are skeptical, so realizing this, Forest E. Olson, a Coldwell Banker Company, was reluctant to release this following computer readout . . . Each of these homes was sold by Forest E. Olson Realtors in no more than four days . . . Startling Information? Yes. If you doubt the authenticity of this computer readout, consider this; if it weren't true, we couldn't say it. That's why we insist when you list your house for sale with Forest E. Olson, you'd better be prepared to move . . . fast.

Approximately 176 of the street addresses shown in the newspaper advertisements were of new tract houses, condominiums, and town houses for which Forest E. Olson, Inc. had exclusive sales contracts with builder developers. Although the sales contracts were executed long before the sales, a listing agreement bearing the date of sale was made out for each sale. The property thus appeared to have been sold on the very day it was listed. Additionally, approximately 10 of the addresses in the advertisement were outside of Orange and Riverside

Counties and 51 houses on the list were not sold within either four or eight days.

Forest E. Olson, Inc. explained that the appearance of the new tract sales in the advertisement was the result of inadvertence; that the advertising department had asked the data processing department for a list of all property sold in four days or less and had relied upon a computer readout list furnished by data processing; and that there had been no "formal vice presidential approval" or review of the advertisement by the company's legal department. In short, defendants maintained that the evidence showed at most an inadvertent oversight by different people in the organization with separate business functions and not an intentional misstatement or reckless disregard of the truth. Defendants conceded, however, in argument before the Court of Appeal, that the evidence presented a factual issue as to whether there was negligent dissemination of false or misleading advertising.

ARGUMENT

I.

THE *NEW YORK TIMES v. SULLIVAN* MALICE STANDARD DOES NOT APPLY TO FALSE ADVERTISING STATUTES.

Section 17500 of the California Business and Professions Code *et seq.* evolved from the so-called "Printers Ink Model Statutes" and was drafted in 1911 at the behest of the advertising journal of the same name.[1] The original printers ink model statute made advertisers absolutely liable for false and misleading statements made in the

[1] The "Printers Ink Model" either in its original form or as modified, has been adopted in 44 states and the District of Columbia. Note, 25 Hastings L.J. 1105, 1106 fn. 9.

advertisement.

Proof of an absence of intent to deceive by the advertiser was not a defense under the Model Statute. The California legislature, however, rejected the strict liability standard in favor of a reasonable care standard. Section 17500 continues the reasonable care standard, prohibiting false advertising "which is untrue or misleading, and which is known or by the exercise of reasonable care should be known, to be untrue and misleading."

Petitioners' advertisement was pure commercial speech; the advertisement did not communicate or editorialize on political, social, cultural or other protected subject matter. Petitioners concede in their petition that the State of California has a compelling interest in protecting the public and competitors from false and misleading advertisements.

The thrust of petitioners' attack upon California's false advertising law is concerned with the imposition of civil penalties for negligent dissemination of false and misleading advertising and its alleged chilling effect upon the free flow of commercial speech. According to petitioners, a false advertising statute which provides for exaction of a civil penalty for each violation of the law cannot pass constitutional muster unless it requires proof that the advertiser knew the information was false and misleading or acted with conscious disregard for the truth. See *New York Times v. Sullivan,* 376 U.S. 254.

Petitioner's contention assumes that since commercial speech has been given some protection by this Court that perforce it is entitled to the same protection afforded to non commercial speech.

Decisions of this Court relating to commercial speech dispel any such assumption.

The Court in a series of recent decisions has repudiated the idea expressed in *Valentine v. Christensen,* 316 U.S. 52, that commercial speech is unprotected by the First Amendment, because society and the free enterprise system has a genuine interest in the free flow of commercial information. (*Bates v. State Bar of Arizona,* 433 U.S. 350; *Linmark Associates, Inc., v. Willingboro,* 431 U.S. 85; *Virginia Pharmacy Bd. v. Virginia,* 421 U.S. 809). This Court has held that advertising which does "no more than propose a commercial transaction" is deemed an exercise of a First Amendment right (*Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* 425 U.S. 748, 771, fn. 24, quoting *Pittsburgh Press Co. v. Human Relations Comm'n.,* 413 U.S. 376, 385).

In *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* this Court clearly stated that commercial speech is subject to reasonable state regulations, however, and that among those regulations which "are surely permissible" are restraints on false, deceptive or misleading advertising.

This Court has consistently indicated that while commercial speech is accorded some constitutional protection, it has not elevated commercial speech to the same level of protection, on the scale of First Amendment values it has accorded to other types of speech. In *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, at 455-456 this Court declared:

> In rejecting the notion that such speech "is wholly outside the protection of the First Amendment", *Virginia Pharmacy, supra,* at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U.S. at 771 n. 24. We have not discarded the 'commonsense' distinction between speech

> proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* . . . [W]e instead have afforded commercial speech a limited measure of protection, *commensurate* with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression . . . .
>
> [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of those kinds of commercial regulation.

Petitioners seek in effect to have this Court treat the purely commercial speech herein the same as speech containing bona fide of political and social comment, by asking the court to apply the *New York Times v. Sullivan* malice standard. See *New York Times v. Sullivan,* 376 U.S. 254.

In New York Times v. Sullivan, supra, a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in a newspaper criticizing police action against members of the civil rights movement and soliciting funds for the movement. The advertisement contained factually erroneous defamatory material. This Court held that the plaintiff must show actual malice: knowledge that the material was false, or in the alternative that the information was placed in the advertisement with reckless disregard for the truth. This Court did so because the communication involved important political comment

regarding a public official. The Court characterized the advertising (at 266) stating the Times advertisement communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

The protection accorded in *New York Times v. Sullivan, supra,* to persons criticizing public officials was found by the United States Supreme Court to be equally applicable to public figures. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, and not applicable to private individuals defamed in connection with public events. (See *Gertz v. Welch,* 418 U.S. 323.)

One of the analytical problems with analogizing between defamation cases and false advertising cases stems from the fact that in the former situation a real person's reputation is damaged by false statements, but in the latter case it is the buying public itself which is harmed.

Respondent contends that for the following common sense reasons, the rationale for requiring the proof of malice set forth in *New York Times v. Sullivan* does not apply to false advertising statutes.

1) Unlike in a false advertising situation *New York Times v. Sullivan* dealt with the non-malicious use of false statements in the expression of beliefs and ideas concerning public officials. *New York Times* clearly indicated that "neither the intentional lie nor the careless error materially advances societies' interest in uninhibited, robust and wide-open debate on public issues." *New York Times v. Sullivan,* 376 U.S. 254, 270. This Court required the malice standard in New York Times because it was obvious that in public debate errors would occur, and that fact alone might inhibit freedom of expression. Unlike

public debate on public issues, an advertiser has the time to calculate his speech and insure its accuracy.

In Justice Stewart's concurring opinion in *Virginia Pharmacy Bd., supra,* he emphasized the fact that the "advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price product advertising will chill accurate and nondeceptive commercial expression" and that therefore there is "little need to sanction 'some falsehood in order to protect speech that matters.' " (*Id.* conc. opn. Stewart, J., pp. 777-778.)

2) *New York Times v. Sullivan, supra,* and *Curtis Publishing Co. v. Butts, supra,* are primarily concerned with criticism of public officials and public figures who have thrust themselves into the public limelight and presumably have access to the media which will enable them to deny the false statements made about them and thus defend themselves. In false advertising cases, the public may never even know if an advertisement is indeed false and is certainly not in a position to "defend itself" in the very media which receives a fee from the advertiser to publish the advertisement.

3) Unlike the person who criticizes a public official and who might do so in error, an advertiser presumably knows his own product or service and is in a superior position to have all the facts concerning it at his disposal. See *Bates v. State Bar of Arizona,* 433 U.S. 350, 383.

4) Unlike persons who may have defamed and wish to sue for damages as a result of defamatory statements, the public at large who reads and relies on advertisements in the media may, in fact, never know they are victims of false, deceptive or misleading advertisements. Even if members of the public became aware of the false nature of the advertisement, it is unlikely they would sue for damages.

5) The High Court in *New York Times v. Sullivan, supra,* was primarily concerned with the protection of the right of newspapers and other media to print false information about public officials.

The California false advertising statute exempts newspapers and other media from suit unless they know the information is false. California's false advertising statute seeks to control false advertising by exaction of a civil penalty against the advertiser alone, who presumably is in a superior position to advertise the truth about his product.

6) The injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made.

Even if it could be argued that *New York Times v. Sullivan* and its progeny apply to the analysis of the constitutionality of California's false advertising statute, the recent case of *Gertz v. Welch,* 418 U.S. 323, clearly indicates that the states have the power to regulate negligent speech.

In *Gertz v. Welch, Inc.,* this Court refused to extend the requirement that a plaintiff in a defamation suit must show "New York Times malice" in situations where the plaintiff is not a public official or public figure even though the plaintiff is defamed in an article about matters of public importance.

In that case, this Court balanced the legitimate state interest underlying the law of libel against the interest of preserving the First Amendment guarantee of freedom of expression and found that as long as states do not impose liability without fault, the state may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to private individuals.

In limiting the kinds and amounts of damages that could be recovered by a private plaintiff in a defamation action, the Supreme Court in *Gertz v. Welch, supra,* stated that remedies for defamatory falsehood reach no further than is necessary to protect the legitimate interest involved. The court refused to allow recovery of punitive and presumed damages, because in defamation of a private person where no malice is shown, the state's only legitimate interest is the compensation of the injured victim. The Court viewed the awarded punitive damages as a windfall for the private plaintiff.

It is important to note that this Court in *Gertz* upheld reasonable regulation of negligent speech even though the subject matter of the speech was of public concern. It is apparent that reasonable regulation of negligent advertising should also be upheld since advertising is accorded less protection under the Constitution.

II.

THE STATE OF CALIFORNIA HAS A LEGITIMATE INTEREST IN IMPOSING CIVIL PENALTIES FOR FALSE AND MISLEADING ADVERTISING.

As, the California Supreme Court recognized in *People v. Superior Court (Jayhill),* 9 Cal. 3d 283, both criminal prosecution of persons and corporations for false advertising violations, or granting of civil injunctive relief are normally inadequate remedies to deter or redress false advertising violations. The court found that the legislative intent in enacting Business and Professions Code Section 17536, which imposes a civil penalty up to $2,500 per violation, was to strengthen the hand of the Attorney General in seeking redress for violations of Business and Professions Code Section 17536. The court declared in footnote 3 at 289:

> The purpose of section 17536 has been described as follows: "The new civil remedy was added because the injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets. The injunction is little more than a cease and desist order. The guilty party keeps his gains and is merely ordered not to defraud people in the same way again. Criminal prosecutions are seldom undertaken because juries tend to be reluctant to apply criminal sanctions to white-collar crimes and because it is difficult for outsiders to fix responsibility in the modern corporate structure. (Review of Selected 1965 Code Legislation (Cont. Ed. Bar 1965) p. 21.)

Herein the trial court, at the conclusion of a trial, has the discretion to award a civil penalty which cannot exceed $2,500 per violation. The imposition of this discretionary penalty is not without limitations however. The penalty must not be so oppressive or unreasonable as to be violative of due process of law. (*Hale v. Morgan,* 22 Cal. 3d 388; *People v. Western Airlines,* 42 Cal. 2d 621, *Ex Parte Young,* 209 U.S. 123.) Recognizing the Fifth Amendment Due Process of Law limitation upon the imposition of oppressive and excessive fines, the California Fourth District Court of Appeals, in its decision herein, *People v. Superior Court (Forest E. Olson),* 96 Cal. App.3d 181, 198 set forth the factors to be considered by the trial court in determining the amount of civil penalties to be awarded for each violation of law:

> Even under our interpretation of the statute, the trial court must manifestly act reasonably in light of all pertinent factors including the kind of misrepresentations or deceptions, whether they were intentionally made or the result of negligence, the circulation of the newspaper, the nature and extent of the public injury, and the size and wealth of the advertising enterprise.

The California Fourth District Court of Appeals, by enunciating the factors which trial courts should consider in determining what a fair civil penalty is, established a flexible and reasonable approach to the redress of false advertising violations. When Section 17500 of the Business and Professions Code is examined in the light of its history, it is clear that such consumer protection laws prohibiting false advertising sprang forth from the abuses of mighty corporations and not from mere inadvertent transgressions of small businessmen. The rationale of Section 17500 and Section 17536 of the Business and Professions Code, as interpreted by *People v. Superior Court (Jayhill), supra, Hale v. Morgan, supra,* and the court below, lies in the law's ability to address violations by both large and small advertisers. The potential award of civil penalties is thus not arbitrary, capricious and oppressive.

CONCLUSION

The California Legislature, in enacting California's false advertising law, properly struck a balance between the public's right to disseminate such information, and the state's interest that the advertising be truthful and accurate. The Legislature properly placed the burden on the advertiser, who knows his product and service, to be reasonably accurate in all advertising. History, as well as logic and human nature, show clearly that the award of a fair, reasonable and discretionary civil penalty is the only meaningful way to enforce truthful advertising laws. The California false advertising laws are thus constitutional, and do not create an unwarranted chilling effect on

commercial communication. Thus the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on April 15, 1980, I served the within *Opposition to Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)